IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2654 OF 2005

M/s.Health Secure (India) Private Limited & Anr. ...Petitioners
V/s.
Municipal Corporation of Greater Mumbai & Ors. ...Respondents

WITH

WRIT PETITION NO. 2655 OF 2005

M/s.Health Secure (India) Private Limited & Anr. ...Petitioners
V/s.
Municipal Corporation of Greater Mumbai & Ors. ...Respondents

WITH

WRIT PETITION NO. 2665 OF 2005

M/s.Health Secure (India) Private Limited & Anr. ...Petitioners
V/s.
Municipal Corporation of Greater Mumbai & Ors. ...Respondents

WITH

WRIT PETITION NO. 2666 OF 2005

M/s.Health Secure (India) Private Limited & Anr. ...Petitioners
V/s.
Municipal Corporation of Greater Mumbai & Ors. ...Respondents

Mr.Anand Kumar for the Petitioners.

Mr.K.K. Singhvi, Sr.Counsel with Ms.Archana R. Joshi for the Respondents (BMC).

CORAM : V.M. KANADE, J.

DATED : JUNE 13, 2007

P.C. :-

1. All these petitions can be disposed of by passing a common order since the petitioners and the respondents are common and the subject matter in respect of these petitions is identical. Brief facts which are relevant for the purpose of deciding these petitions are as under:-

2. Petitioner No.1 is a private limited company incorporated under the provisions of the Companies Act and has its registered office situated at C-10, M.I.D.C. Taloja, District Raigad, Maharashtra. The petitioner is a manufacturer and dealer of medicines and pharmaceutical preparations. On 25th October, 2001, a licence bearing No.KD 463 was issued to the petitioners by the Joint Commissioner, Food and Drug Administration, Kokan Division, under Form 25. Thereafter, on 11.1.2005, further list of medicines which were manufactured by the petitioners including item "SENHEAL-BD" and the other products mentioned in the petition were added and permission was accordingly granted by the Food and Drug Department. Accordingly, the petitioners started manufacturing the said products.

Thereafter, the petitioners sent a letter dated 4.4.2005 to the respondents herein informing them that the said "SENHEAL-BD" and the other medicines manufactured under the valid licence and therefore, they were exempted from octroi. It is the case of the petitioners that no reply was given by the respondents to this letter and they insisted on levying octroi on the said products. It is the case of the petitioners that therefore, there was no option but to pay the octroi and the same was levied unauthorizedly and unlawfully under Entry A-11 of Schedule H of the Mumbai Municipal Corporation Act, 1988. Thereafter, the petitioners protested against the said levy of octroi but they were constrained to make payment to release their goods from the octroi. The petitioners, therefore, filed these petitions under Article 226 of the Constitution of India challenging the legality and propriety of the impugned order of the respondents on 8th June, 2005 which is annexed at Exhibit-E after classifying the said medicine under Entry A-11 Schedule H of the BMC Act 1999 and in respect of the other petitions viz. Writ Petition No. 2655, 2665 and 2666 classifying the medicines under Entry 59, Entry 10 and Entry A-7 of the Schedule. The petitioners are seeking appropriate writ, order or direction

restraining the respondents from levying and collecting octroi on the said medicines under the said Entry of Schedule H of the BMC Act. They are further seeking refund of the amount which has already been paid by the petitioners.

3. The learned Counsel for the petitioners submitted that the said products which were manufactured by the petitioners viz. "SENHEAL-BD", "C-HEX", "SENHEAL-F" and "SENHEAL Oral Gel" are all medicines manufactured under one licence No.ED 463 and therefore, these medicines are exempted from levy of octroi. The learned Counsel submitted that the Drug Licensing Authority having classified the said products as an item of medicine, the onus of proving that it is not a medicine was on the Corporation and not on the petitioner. He submitted that in any event, the said medicines did not fall under Entry A-11, Entry 59, Entry A-10 and Entry A-7, of Schedule H. It is submitted that the respondents have not furnished any evidence to justify the levy of octroi under the said items. He further submitted that the respondents have no right or authority in law to classify the goods under different item when the goods were manufactured under valid

licence which was issued by a competent licensing authority. The learned Counsel for the petitioners relied on number of judgments of this Court in which the said action on the part of the respondents in classifying the goods under a different head was set aside and wherein it was held by this Court that the burden of establishing the fact that the goods did not belong to the category of medicine squarely was on the respondents and without first establishing that the goods were not medicines, the respondents were not entitled to levy octroi. He relied on a judgment of the Single Judge of this Court in the case of **Procter & Gamble India Ltd. V/s. The Municipal Corporation of Greater Bombay and Ors. reported in 2004 (1) All MR Page 425** and also the judgment of the Single Judge of this Court in **Writ Petition No.2652/2004 (Elder Pharmaceuticals Ltd. and Another V/s. Municipal Corporation of Greater Mumbai and others** which was delivered on 6th February, 2007 and also a judgment which was delivered on the same date in Writ Petition No.3230/2004 and a judgment which was delivered on the same date in Writ Petition No.2651/2007. He also relied on the Division Bench Judgment of this Court in Appeal No.916/1993 in Writ Petition No.3589/88 dated 9th

August, 1994. He submitted that the ratio of these judgments of this Court were squarely applicable to the facts of the present case.

4. The learned Counsel Mr.K.K. Singhvi, on behalf of the Corporation submitted that Exhibit E which was under challenge was filled up by the petitioner under his own signature and he had classified the said goods under the said category which was mentioned in the said form. He submitted that therefore, the octroi authority had accordingly levied octroi on the basis of entry made by the petitioner in the said Form-B. He submitted that therefore, there is no illegality committed by the respondents in levying octroi. He submitted that since the petitioners have produced the licence for the manufacture of medicine, he may produce the product and the respondents may conduct an inquiry and if they are satisfied that the said product is medicine, the amount which is paid by the petitioners will be refunded. He invited my attention to para 5 of his affidavit in reply in which a specific averment has been made by the respondents. He submitted that therefore, the ratio of the judgments on which reliance was placed by the petitioners will not apply to the facts of the present

case.

5. The learned Counsel for the petitioners further invited my attention to the rejoinder which is filed by the petitioners in which he had categorically denied the said averments which were made by the respondents in para 5. He submitted that in fact, the petitioners were compelled to put the entry as dictated by the octroi officer.

6. In my view, it is an admitted position that the petitioners have been manufacturing the said products under the licence which has been annexed to this petition. This licence has been issued by the competent authority which has been authorised to classify the said goods. The petitioners also furnished additional list of medicines were being manufactured by the petitioners pursuant to the permission granted by the FDA under the said licence dated 11th January, 2005 whereby this further list of medicines manufactured by the petitioners was included in the said licence. The petitioners thereafter also had sent a letter of clarification to the respondents dated 4th April, 2005. The respondents chose not to give any reply to the said

letter. Thereafter, the goods of the petitioners were classified under the impugned category. In my view, the octroi authorities had no right to classify the said goods under the said category after the competent authority had classified it as medicines. It is well settled position in law that the provision of taxing statute have to be construed very strictly and once the initial burden of establishing that the product is a medicine by producing the licence issued by competent authority, the burden would then shift on the Corporation. It cannot be said that the respondents do not have any authority to scrutinise or examine the products of which licence has been issued by the competent authority. The Corporation could independently get the product examined through their chemical analyser and if it is proved after proper analysis that the product in question is not a medicine as claimed by the petitioner then demand octroi from them. It is an admitted position that this procedure has not been followed in these cases. In my view, the ratio of the judgments relied upon by the learned Counsel for the petitioner is squarely applicable to the facts of the present case. The impugned order, therefore, will have to be set aside. The respondents

shall refund the octroi which they had collected from the petitioners.

7. Rule is made absolute in terms of prayer clauses (a) and (b). However, it is made clear these directions shall not come in the way of respondent Corporation to take proper steps in future in respect of goods entering the Corporation limit and may take further steps after giving an appropriate Show Cause Notice to the petitioners and after scrutinising the said goods and after following the principles of natural justice.

8. Rule is made absolute accordingly in the above terms. Under the circumstances, there shall be no order as to costs.

(V.M. KANADE, J.)